IN THE TEXAS COURT OF CRIMINAL APPEALS

EX PARTE JAVIER SUAREZ MEDINA	)	
Applicant.	)	**No. _____**

BRIEF *AMICUS CURIAE* OF THE UNITED MEXICAN STATES IN SUPPORT OF JAVIER SUÁREZ MEDINA[1]

STATEMENT OF FACTS

Fourteen years ago, Texas authorities arrested Javier Suárez Medina and charged him with capital murder. At the time, Mr. Suárez Medina was a learning-disabled nineteen-year old with no criminal record who was ill-equipped to face the complexities of a capital trial. Because Texas authorities failed to notify him of his right to communicate with his consulate, pursuant to Article 36 of the Vienna Convention on Consular Relations,[2] he had no idea that Mexican consular officers were available to help him – and Mexico was unaware of that he was eligible for consular assistance.

From the time of Mr. Suárez Medina's arrest, the authorities had reason to believe that he was a Mexican national. During his statement to the police on the day following his arrest, Mr. Suárez Medina informed the interrogating officer that he was born in Piedras Negras, Mexico. *See*

[1] No person or entity other than the *amicus* made a monetary contribution to the preparation or submission of this brief. The Government of Mexico is the sole source of any fees paid for preparation of this brief.

[2] Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77 (the "Vienna Convention" or

Exhibit LL to Application for Writ of Habeas Corpus (Custodial Statement given by Mr. Suárez Medina). Mr. Suárez Medina was also carrying a "green card" in his wallet (the identification card issued to resident aliens by the United States Immigration and Naturalization Service), which was confiscated by the police when he was arrested. *See* Exhibit A to Application for Writ of Habeas Corpus (Affidavit of Javier Suárez Medina). Nevertheless, neither the police nor prosecutors notified him of his right to communicate with his consulate, as required under Article 36(1) (b) of the Vienna Convention on Consular Relations. *See* Vienna Convention on Consular Relations, April 24, 1963, TIAS 6820, 21 U.S.T. 77; Exhibit A to Application for Writ of Habeas Corpus (Affidavit of Javier Suárez Medina). A diligent search of the files of the Government of Mexico has revealed no indication that any such notification was ever provided. Indeed, Mexican consular authorities only became cognizant of the case through their own efforts, finally ascertaining Mr. Suárez Medina's nationality many months after his arrest.

The Dallas consulate first learned of Mr. Suárez Medina's detention from media reports in December 1988, immediately after his arrest for the murder of Lawrence Cadena. Observing that all of the suspects had Hispanic surnames, a Mexican consular official contacted the office of the district attorney to inquire as to their nationality. The district attorney's office replied that the detainees were all Cuban nationals. Relying on this misinformation, the consulate did not attempt to interview Mr. Suárez Medina. Exhibit C to Application for Writ of Habeas Corpus (Affidavit of Oliver Farres Martins).

Through media coverage of the trial, Mexican consular officials were aware that prosecutors were seeking the death penalty – but since they erroneously believed Mr. Suárez Medina was a Cuban national, they did not intervene, nor did they contact Mr. Suárez Medina's

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"Convention").

family. Near the end of the trial, however, consular staff heard Mr. Suárez Medina speaking on television and observed that he had a Mexican accent. The Dallas consulate again contacted the authorities to inquire as to Mr. Suárez Medina's nationality. This time, they were told that his nationality was "unknown." *Id.* On Friday, June 2, 1989, consular staff contacted defense counsel for Mr. Suárez Medina, with the hope of obtaining more accurate information. With only one day left in Mr. Suárez Medina's sentencing hearing – and after having represented him for nearly six months – defense counsel stated that they were also uncertain as to Mr. Suárez Medina's nationality. They informed the consulate that Mr. Suárez Medina's sentencing hearing would continue on Monday, June 5. *Id.*

On Monday, June 5 – the day on which the jury sentenced Mr. Suárez Medina to death – the consulate once again contacted the police department and the office of the district attorney to press for more information regarding Mr. Suárez Medina's nationality. This time, the authorities informed the consulate that he was likely Cuban or Colombian. On Tuesday, June 6, consular officials were finally able to confirm, through the Immigration and Naturalization Service (INS), that Mr. Suárez Medina was a Mexican citizen with legal residence in the United States. After obtaining additional information from the INS on June 7, consular officials interviewed Mr. Suárez Medina on June 8, 1989. His death sentence had been imposed three days earlier. *Id.*

In subsequent years, during which Mr. Suárez Medina appealed his conviction and sentence to this Court, then pursued state and federal post-conviction relief, Mexican consular officials closely monitored his case, regularly visiting him in prison, and conferring closely with defense counsel. Mexico has also invested substantial resources in his defense, retaining experienced counsel to assist post-conviction counsel in developing legal claims. In addition, Mexico has retained an

investigator and two mental health experts – Dr. Ricardo Weinstein and Dr. Gilda Kessner – to develop mitigating evidence that was never introduced at the time of Mr. Suarez Medina's trial. Exhibit B to Application for Writ of Habeas Corpus (Affidavit of Juan Manuel Gómez Robledo); Exhibit E (Affidavit of Dr. Ricardo Weinstein); Exhibit F (Affidavit of Dr. Gilda Kessner); and Exhibit MM (Affidavit of Tena Francis).

As a result of these efforts, Mexico has uncovered mitigating evidence that was never developed by Mr. Suarez Medina's trial lawyers. It is clear that this evidence existed at the time of Mr. Suárez Medina's trial, and would have been highly relevant to the jury's decision at the sentencing phase.

Since Mr. Suárez Medina's death sentence was imposed, Mexico has filed two diplomatic protests regarding the violation of article 36 in his case. Exhibit D to Application for Writ of Habeas Corpus (Diplomatic Note Filed with the United States Department of State); No court has ever reviewed this issue, since trial counsel was unaware of the treaty and failed to object to the violation at trial.

SUMMARY OF ARGUMENT

Had Mexican consular officials been provided an opportunity to assist Suárez Medina in 1989, he would not be on death row today. The results of Mexico's efforts in numerous capital cases around the nation dramatically illustrate the value of consular assistance in a capital trial – and provide compelling proof that Mexico's involvement would have changed the outcome of Mr. Suárez Medina's trial.

There is no question that Texas authorities failed to comply with Article 36 of the Vienna

Convention on Consular Relations, which requires local authorities to notify a detained foreign national, without delay, of his right to communicate with his consulate. At the detainee's request, the authorities must also notify consular officials – again, without delay – of his incarceration. Vienna Convention, art. 36, 21 U.S.T. at 100-01. Because local authorities failed to carry out this mandate, Mexican consular officials were effectively precluded from providing the assistance described above.

While numerous state and federal courts have grappled with the application of Article 36, no court has squarely addressed the June 27, 2001 decision of the International Court of Justice ("ICJ") in the *LaGrand Case (Germany v. United States)*, 2001 ICJ 104 (Judgment). This authoritative decision – which is directly applicable to the case of Mr. Suárez Medina – will affect all cases of foreign nationals sentenced to severe penalties, who have alleged a violation of Article 36.

The ICJ's jurisdiction in *LaGrand* was founded upon the Optional Protocol to Article 36 of the Vienna Convention, a treaty ratified by the United States. Under the Optional Protocol, the United States chose to submit all "[d]isputes arising out of the interpretation or application of the [Vienna] Convention" to the ICJ for resolution. Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, art. 1, 21 U.S.T. 325. As a result, the court's decision is binding on the United States under the Optional Protocol, Article 94 of the U.N. Charter, and customary international law.

Confronting a factual scenario strikingly similar to the case of Mr. Suárez Medina, the *LaGrand* court resolved several issues that had divided the lower courts of the United States. First, the ICJ unequivocally held that Article 36, paragraph 1 creates an individual right to consular

notification and access. *LaGrand*, paras. 77, 128(3). Second, the court held that a foreign national deprived of his Article 36 rights, and sentenced to a "severe penalty," is entitled to "review and reconsideration" of his conviction and sentence. *Id.*, para. 128(7). Third, the court held that domestic rules of procedural default, as applied in the case of the *LaGrand* brothers, violated the United States' obligation to give "full effect" to the purposes of Article 36. *Id.*, paras. 91, 128(4). Thus, *LaGrand* definitively establishes that petitioners such as Mr. Suárez Medina – whose case cannot be distinguished from *LaGrand* – are entitled to a judicial review of their Article 36 claims.

The Court also established important guidelines for judicial review of such arguments. In *LaGrand*, Germany argued that there was a causal relationship between the breach of Article 36 and the ultimate execution of the LaGrand brothers. *Id.* at para. 71. Specifically, Germany argued that consular officials would have been able to present persuasive mitigating evidence that would have changed the outcome of the LaGrand cases. *Id.* The United States countered that such arguments were speculative, and challenged Germany's assertions that it would have provided such assistance in 1984. *Id.* at para. 72. The Court ultimately concluded that it was "immaterial" whether consular assistance from Germany would have affected the verdict. Put differently, the Court rejected the notion that a foreign national must demonstrate he was prejudiced by the Article 36 violation, before he is entitled to an effective remedy for the violation.

Finally, the court addressed the question of remedies for Article 36 violations. The United States had argued Germany was entitled to no more than an apology for the breach of Article 36. The court squarely rejected this argument, observing that an apology was an insufficient remedy in any case where a foreign national was not advised without delay of his rights under Article 36, paragraph 1, of the Vienna Convention, and was facing prolonged detention or a severe penalty –

such as the penalty of death. *Id.*, paras 63, 123, 125.

In considering the remedy appropriate in the case of Mr. Suárez Medina, this Court should also look to the advisory opinion issued by the Inter-American Court on Human Rights[3] on October 1, 1999. OC-16/99, Inter-Am. Ct. H.R. (October 1, 1999). The Inter-American Court received briefs and heard oral argument from eight nations – including the United States – and eighteen non-governmental organizations, academics, and individuals appearing as *amici curiae*. After analyzing the text of the treaty, the intent of the parties, and its application in capital cases, the court concluded that Article 36 provides one of the "minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial" – a right embodied in Article 14(3)(b) of the International Covenant on Civil and Political Rights ("ICCPR").[4] *Id.* at para. 122. The Inter-American Court concluded that international law prohibits the execution of an individual whose consular notification rights were violated. *Id.* at para. 7.

In the wake of *LaGrand* – particularly when viewed in tandem with the Inter-American Court's decision and other principles of international law – there can be no doubt that Mr. Suárez Medina is entitled to judicial review of the substance of his arguments, and a meaningful remedy for the violation of his Article 36 rights.

[3] The Inter-American Court on Human Rights has jurisdiction to issue advisory opinions "regarding the interpretation of the [American] Convention or other treaties concerning the protection of human rights in the American States." American Convention on Human Rights, Nov. 22, 1969, OAS/Ser.L.V/11.92, doc. 31 rev. 3 (May 3, 1996).

[4] International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 14, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976). The United States ratified the ICCPR on June 8, 1992, and has not adopted any reservations with regard to Article 14.

ARGUMENT

A. The ICJ's Judgment Is Authoritative and Binding Precedent In the Case of Mr. Suárez Medina.

1. The State of Texas Is Bound To Apply the ICJ's Decision Under the Charter of The United Nations.

The United Nations Charter is a multilateral treaty, duly ratified by the U.S. Senate. United Nations Charter, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, June 26, 1945. Under the Supremacy Clause of the United States Constitution, the State of Texas is bound by its terms. U.S. Const. Arts. VI, cl. 2; *Hines v. Davidowitz,* 312 U.S. 52, 62-63 (1941)("[w]hen the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land").

The ICJ is the "principal judicial organ of the United Nations," U.N. Charter, art. 92. Pursuant to the U.N. Charter, "[a]ll Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice." U.N. Charter, art. 93. Thus, the provisions of the Statute of the ICJ also constitute the "supreme Law of the Land" and are binding on Texas.

Article 94 of the U.N. Charter provides that "each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." The language of article 94 is clear and unequivocal. As one commentator has observed, this provision, "as well as corresponding provisions of the ICJ Statute, transfer adjudicatory authority to the U.N. and its organs, and the attribution of binding legal force to their decisions."[5] Sanja Djajic, *The Effect of International Court of Justice Decisions on Municipal*

[5] As *LaGrand* makes clear, foreign nationals have a right to judicial review of Article 36 violations – and it is Article 36 that provides the basis for Mr. Suárez Medina's claim for relief, not the U.N. Charter. Thus, Mr. Suárez Medina's case is distinguishable from *Committee of United States Citizens v. Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1987).

Courts in the United States: Breard v. Greene, 23 HASTINGS INT'L & COMP. L. REV. 27, 50 (1999). *See also* International Court of Justice, *A Guide to the History, Composition, Jurisdiction, Procedure, and Decisions of the Court: The Decision*, <http://www.ICJ-cij.org/ICJwww/igeneralinformation/ibbook/Bbookchapter5.HTM> (last visited August 15, 2001)[hereinafter "History of the ICJ"](ICJ "has always taken the view that it would be incompatible with the spirit and the letter of the Statute and with judicial propriety to deliver a judgment the validity of which. . . would have no practical consequences so far as their legal rights and obligations were concerned")(citing *Free Zone of Upper Savoy & the District of Gex*, 1932 P.C.I.J. (ser. A/B) No. 46, p. 35 (Judgment)).

Mexico respectfully requests that this Court give effect to the ICJ's decision in *LaGrand*, and enforce the United States' obligations under the U.N. Charter, the ICJ Statute, the Vienna Convention, and the Optional Protocol to that Convention.

2. Customary International Law

The decisions of the ICJ are also binding under customary international law. Shabtai Rosenne, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT OF JUSTICE 127 (1965); *Committee of United States Citizens v. Reagan*, 859 F.2d 929, 938 (1987). It is equally settled that customary international law is part of the law of the United States. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

Although the D.C. Circuit sought to limit the application of this norm of customary international law in *Committee of United States Citizens*, the court acknowledged that "[i]n special agreement cases – in which both parties to a dispute simultaneously submit to the ICJ's jurisdiction

– adherence to the Court's judgment may well be the norm." 859 F.2d at 941. *LaGrand* was a special agreement case. The ICJ's jurisdiction in *LaGrand* was founded upon the Optional Protocol to Article 36 of the Vienna Convention, a treaty ratified by the United States. The Optional Protocol provides:

> Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, art. 1, 21 U.S.T. 325. Thus, unlike the situation in *Committee of Citizens*, the United States consented to the ICJ's jurisdiction in *LaGrand*, and participated fully in written and oral proceedings before the court.

Customary international law requires that nations obey the rulings of an international court to whose jurisdiction they submit – particularly when, as here, the court's jurisdiction is founded upon a binding treaty obligation.

3. The ICJ's Judgment Applies to All Foreign Nationals Sentenced to Severe Penalties.

While the *LaGrand* court addressed a claim brought by Germany on behalf of two German nationals, the principles announced by the court apply with equal force to the case of Suárez Medina. The court explicitly acknowledged the position of equally situated foreign nationals when addressing the issue of an adequate remedy for the breach of Article 36:

> The United States has presented an apology to Germany for this breach. The Court considers however that an apology is not sufficient in this case, as it would not be in other cases where foreign nationals have not been advised without delay of their rights under Article 36, paragraph 1, of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties.

LaGrand, para. 123.

While the ICJ's judgment in *LaGrand* is ostensibly "binding" only on the parties to the litigation,[6] the principles announced in the opinion serve as authoritative precedent for all states party to the Vienna Convention. History of the ICJ, *supra* (court maintains "consistency in its decisions" that "influence the attitude of States towards questions that have already been dealt with by the Court"). It is equally apparent that, in the event of future breaches of Article 36 by the United States involving non-German nationals, parties to the Optional Protocol would be entitled to invoke the ICJ's jurisdiction and obtain a similar judgment. *Id.* (it is "reasonable to suppose that where the ICJ has decided a case it would have to have serious reasons for thereafter deciding in a similar case to adopt a different approach").

Any attempt by the United States to limit the application of *LaGrand* to German nationals would violate the Fourteenth Amendment's proscription against discrimination based on national origin. *See, e.g., Espinoza v. Farah Manufacturing Co., Inc.*, 414 U.S. 86 (1973); *Makhija v. Deleuw Cather & Co.*, 666 F. Supp. 1158, 1175 (N.D. Ill. 1987). Moreover, the courts of the United States cannot provide a remedy to German nationals that is not equally available to non-Germans, without running afoul of the United States' obligations under both the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Racial Discrimination ("CERD").[7]

Article 26 of the ICCPR specifically guarantees that "[a]ll persons are equal before the law

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[6] Statute of the International Court of Justice, art. 59, Oct. 24, 1945, 59 Stat. 1055.

[7] The Convention for the Elimination of All Forms of Racial Discrimination opened for signature May 7, 1966, and was signed by the United States September 28, 1966. 600 U.N.T.S. 195. The Senate ratified the convention October 21, 1994. 140 Cong. Rec. S7634-02 (daily ed., June 24, 1994).

and are entitled without any discrimination to the equal protection of the law." ICCPR, art. 26. In relevant part, the Race Convention obligates member states to "prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, **or national or ethnic origin**, to equality before the law," including the "right to equal treatment before the tribunals and all other organs administering justice." CERD, Article 5(a), *emphasis added*. This principle is also recognized as a norm of customary international law. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITE D STATES §711 cmt. C (1987).

In Mexico's view, any attempt to limit *LaGrand'*s application to German nationals would violate these cardinal principles of non-discrimination.

B. The Application of Procedural Default Rules to Bar Merits Review of This Claim Would Violate the Supremacy Clause

The State may suggest that state rules of procedural default justify the dismissal of Mr. Suárez Medina's state post-conviction application. This Court should reject such an invitation, in light of *LaGrand* and the supremacy of treaties over inconsistent state laws.

In *LaGrand,* the ICJ analyzed the application of procedural default rules in a case factually indistinguishable from the case of Mr. Suárez Medina. There, Germany argued that the courts' application of procedural default rules was inconsistent with the United States' obligations under Article 36(2) of the Vienna Convention. The Court concurred, noting that the waiver of this argument was attributable to the failure of American authorities to comply with their Article 36(1)(b) obligations.

> As a result, although United States courts could and did examine the professional competence of counsel assigned to the indigent LaGrands by reference to United States constitutional standards, the procedural default rule prevented them from

> attaching any legal significance to the fact, *inter alia*, that the violation of the rights set forth in Article 36, paragraph 1, prevented Germany, in a timely fashion, from retaining private counsel for them and otherwise assisting in their defence as provided for by the Convention. Under these circumstances, the procedural default rule had the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under this article are intended,' and thus violated paragraph 2 of Article 36.
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> *LaGrand,* para. 91.

This conclusion is entitled to deference from state courts considering identical claims. By ratifying the Optional Protocol, the United States conceded the exclusive jurisdiction of the ICJ over "disputes arising out of the interpretation or application of the Convention." The ICJ's authority to decide such issues cannot be questioned. Because Mr. Suárez Medina's failure to preserve this issue by objecting at trial was directly attributable to the failure of local authorities to advise him of his rights – as in *LaGrand* – the application of the procedural default doctrine here cannot be squared with the ICJ's judgment.

The application of state procedural default rules would also violate the Supremacy Clause of the United States Constitution. Supreme Court has repeatedly recognized the supremacy of treaties over state laws, policies, and constitutions. *United States v. Belmont*, 301 U.S. 324, 327 (1937); *United States v. Pink*, 315 U.S. 203 (1941). State law "must yield when it is inconsistent with, *or impairs the policy or provisions of,* a treaty or of an international compact or agreement. *Pink*, 315 U.S. at 231 (emphasis added).

There can be no doubt that the application of procedural default rules in this case would "impair" this Court's ability to review and consider the merits of the treaty violation here. Thus, the procedural default doctrine must give way to the United States' obligations to give "full effect" to the purposes of Article 36. *See* Douglass Cassel, *Judicial Remedies for Treaty*

Violations in Criminal Cases, 12 LEIDEN J. INT'L L. 851, 885 (1999); Jordan J. Paust, *Breard and Treaty-Based Rights Under the Consular Convention*, 92 A.J.I.L. 691, 692 (1998)(federal judges may not fashion procedural rules to subvert the domestic effect of a treaty).

The State may suggest that *Breard v. Greene*, 523 U.S. 371 (1998), supports the application of procedural default rules when considering article 36 claims. *Breard*, however, addressed the application of *federal* rules of procedural default. It has long been accepted that federal statutes and treaties are on the same footing. *Whitney v. Robertson*, 124 U.S. 190 (1888). The same cannot be said for *state* statutes – which, as noted above, must yield when they impair the United States' treaty obligations. Article 36(2) requires that states give "full effect. . . to the purposes for which the rights accorded are intended." This treaty provision, which supercedes any inconsistent state laws, clearly mandates review of Mr. Suárez Medina's Article 36 claim.

C. Mr. Suárez Medina's Death Sentence should be Vacated in Accordance with the Remedies Prescribed by International Law for Treaty Violations

It is axiomatic that international law requires strict observance of due process in death penalty cases. The Inter-American Court on Human Rights has observed that, since the lack of consular notification is "prejudicial to the guarantees of due process," a state may not impose the death penalty in the cases of individuals deprived of their Article 36 rights. OC-16/99 at para. 137. The court concluded that the execution of a foreign national under these circumstances would constitute an arbitrary deprivation of life in violation of article 6 of the ICCPR. *Id.*

The remedy prescribed by the Inter-American Court is consistent with the remedy required under established principles of international law. While Article 36(1)(b) of the Vienna

Convention fails to specify an appropriate remedy, this omission should not be taken to mean that no remedy is available to individuals whose rights are violated under the treaty. "[I]t is not unusual for "substantive rights [to] be defined by [treaty] but the remedies for their enforcement left undefined or relegated wholly to the states." Carlos Manuel Vasquez , *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1144 (1992)(quoting Hart & Wechsler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 533 (1988). Indeed, the International Court of Justice has recognized that a remedy must be imposed for the breach of an international agreement – even where the remedy is not provided in the text of a Convention. *Factory at Chorzow* (Jurisdiction)(Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 6, at 21 (July 27).

The preamble to the Vienna Convention provides some guidance in this regard: it specifies that matters not expressly covered by the treaty are subject to customary international law. 21 U.S.T. at 79. Norms of customary international law therefore determine what consequences should flow from a state's breach of Article 36(1) in a capital case. Vasquez, *supra*, at 1157; Frederic L. Kirgis, *Restitution as a Remedy in U.S. Courts for Violations of International Law*, 95 Am. J. Int'l L. 341 (2001).

Of the remedies commonly provided under international law, *restitutio in integrum* is the only one suited to the facts of Mr. Suárez Medina's case.[8] *See People v. Madej*, 2000 Ill. LEXIS 1215 at *16 - *22 (Ill. August 10, 2000)(McMorrow, J., concurring in part and dissenting in part)(advocating that a defendant's death sentence be vacated as a remedy for Article 36 violation, citing OC/16).[9] *Restitutio in integrum* calls for "the restoration of the prior situation, the reparation

[8] *Restitutio in integrum* is also consistent with Article 36(2), which requires that parties give "full effect" to "the purposes for which the rights accorded under this article are intended."

[9] *See also* Linda Jane Springrose, *Note: Strangers in a Strange Land: The Rights of Non-Citizens Under*

of the consequences of the violation, and indemnification." *Velasquez Rodriguez Case* (Compensatory Damages), 7 Inter-Am. Ct. H.R. (ser. C) para. 26 (1989). *See also Factory at Chorzow* (Merits)(Germ. v. Pol.), 1928 P.C.I.J. (ser. A), No. 17, at 47 (Sept. 13); *Case Concerning the Temple of Preah Vihear* (Cambodia v. Thail.), 1962 ICJ 37 (June 15); International Law Commission: Draft Articles on State Responsibility, 37 I.L.M. 440 (1998); U.N. GAOR, 51st Sess., Supp. No. 10, at 125-51, U.N. Doc. A/51/10 and Corr. 1 (1998). Black's Law Dictionary explains that *restitutio in integrum* can be accomplished by "rescinding or annulling a contract or transaction valid by the strict law, or annulling a change in the legal condition produced by an omission, and restoring the parties to their previous situation or legal relations." BLACK'S LAW DICTIONARY 1180 (1979). Mr. Suárez Medina is entitled, at minimum, to an "annulment" of his death sentence to restore him to his position *before* Texas officials violated his right to consular notification.

The need for an effective remedy is particularly acute in a capital case. An apology – like a promise to refrain from similar violations in the future – will provide no comfort to Mr. Suárez Medina, who is facing execution. International law requires that procedural guarantees of fairness and due process be strictly observed when a country seeks to impose the death penalty. *See Reid v. Jamaica* (No. 250/1987), Report of the Human Rights Committee, GAOR, 45th Session, Supplement No. 40, Vol. II (1990), Annex IX, J, para. 12.2, *reprinted in* 11 Hum. Rts. L.J. 321 (1990)("in capital punishment cases, the duty of States parties [to the ICCPR] to observe rigorously all the guarantees for a fair trial. . . is even more imperative"); G.A. Res. 35/172, Dec. 15, 1980

Article 36 of the Vienna Convention on Consular Relations, 14 Geo. Immigr. L.J. 185, 209-213 (1999); Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT'L L. 565, 610 (1997).

(member states must "review their legal rules and practices so as to guarantee the most careful legal procedures and the greatest possible safeguards for the accused in capital cases"); NIGEL RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 225-28 (1999); Case 11,139, Inter-Am. C.H.R. at para. 171, Report No. 57/96 of 6 December 1996, OEA/Ser/L/V/II.98, Doc. 7, rev., (February 19, 1998)("before the death penalty can be executed, the accused person must be given all the guarantees established by pre-existing laws, which includes those rights and freedoms enshrined in the American Declaration [of the Rights and Duties of Man]").

To fulfill the United States' obligations under Article 36, the International Covenant on Civil and Political Rights, and customary international law, this Court should grant Mr. Suárez Medina's application for post-conviction relief, and vacate his conviction and death sentence.

D. Mr. Suárez Medina was Prejudiced by the Violation of the Vienna Convention

The International Court of Justice has unequivocally rejected the notion that a defendant must demonstrate "prejudice" before he is entitled to a remedy for an Article 36 violation:

> It is immaterial for the purposes of the present case whether the LaGrands would have sought consular assistance from Germany, whether Germany would have rendered such assistance, or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights, and that Germany and the LaGrands were in effect prevented by the breach of the United States from exercising them, had they so chosen."

LaGrand, para. 74. The Inter-American Court on Human Rights has likewise implied that a defendant need not show prejudice, before he is entitled to a meaningful remedy for the violation. The decisions of these international tribunals call for revision of the "prejudice" standard adopted by some lower courts considering Vienna Convention claims.[10] Particularly in a capital case,

[10] *See, e.g.*, *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996)(applying prejudice standard without

prejudice should be presumed. Should this Court adopt a prejudice test – despite the rejection of this standard by international tribunals – a full evidentiary hearing is warranted.

Although he is not required to demonstrate prejudice, Mr. Suárez Medina has amply demonstrated the harm resulting from the Article 36 violation in his case. *See* Application for Writ of Habeas Corpus at 8-15; 46-52. The evidence establishes that at the time of his arrest, Mr. Suárez Medina was a learning-disabled, mentally impaired teenager who would have benefited greatly from consular assistance. Without repeating the facts presented in Mr. Suárez Medina's Application for Writ of Habeas Corpus, Mexico would observe that the jury heard *none* of the evidence presented in the Application during the defense penalty-phase presentation. Dr. Gilda Kessner, a psychologist retained by the Government of Mexico, observed that during the penalty phase of Mr. Suárez Medina's trial, the defense failed "to clearly identify the deficits and damaging developmental experiences suffered by Mr. Medina, [and failed] to provide a meaningful explanation of the impact of those experiences." Exhibit F to Application for Writ of Habeas Corpus.

There is certainly a "reasonable probability" that the new evidence uncovered through Mexico's investigation would have resulted in a life sentence. After conducting a clinical interview and neuropsychological evaluation of Mr. Suárez Medina, Dr. Ricardo Weinstein concluded:

> It is my opinion that Mr. Suárez Medina suffered from mental impairments, including post-traumatic stress disorder, attention deficit disorder, learning disabilities, and brain dysfunction, that affected his behavior at the time he killed Larry Cadena. Mr. Suárez Medina has consistently maintained that he shot

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discussion); *Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. 1994)(holding violation of INS consular notification regulations did not implicate "fundamental" right, therefore alien must demonstrate prejudice); *United States v. Esparza-Ponce*, 7 F. Supp. 2d 1084 (S.D. Cal. 1998)(applying prejudice standard based on *Faulder*).

> Officer Cadena without premeditation or volition, after hearing a loud noise which he took to be a gunshot. . . These deficits provide, at minimum, an explanation for his actions on the night of the crime.

Exhibit E to Application for Writ of Habeas Corpus (Affidavit of Dr. Ricardo Weinstein). The impact of this evidence, particularly when viewed in light of the mitigating evidence uncovered by Mexico's investigator, cannot be overstated. As Tena Francis, the mitigation specialist retained by Mexico, observed:

> Evidence of Mr. Suárez Medina's mental impairments and deficits is important for several reasons. First, it provides a mitigating explanation for his conduct on the night of the offense. Apart from this incident, Mr. Suárez Medina had absolutely no history of violent behavior. Yet this offense was unquestionably brutal. Without an adequate explanation for the crime, the jury could, mistakenly, believe that Mr. Suárez Medina was simply a brutal killer who was capable of controlling himself – as demonstrated by his otherwise peaceful life – but who deliberately chose to commit an act of great violence.

Exhibit MM to Application for Writ of Habeas Corpus (Affidavit of Tena Francis).

This Court should reject any suggestion that Mexico's involvement in Mr. Suárez Medina's case would have been qualitatively different in 1989. Mexico's polices regarding the defense of foreign nationals were substantially the same in 1989 as they are today. Should there be any doubt on this point, Mexico has provided examples of three capital cases, all prosecuted in Texas in the late 1980s and early 1990s, in which Mexican consular officers provided substantial assistance. In all three cases, the defendants were able to avoid the imposition of the death penalty, due in large part to Mexico's efforts. *Id.*

Mexico's efforts on behalf of its citizens in capital cases have been well documented.[11]

[11] *See* Victor M. Uribe, *Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice*, 19 HOUS. J. INT'L L. 375, 414 (1997)("By custom and practice the Mexican Consulate actively intervenes as soon as it is notified of a Mexican National's detention and/or arrest."). From December 1, 1994 to August 15, 2000, Mexican consular officials provided assistance to 261 Mexican nationals involved in death penalty cases. Of those cases, 119 avoided capital prosecution, 19 were acquitted and

Mexican consular officials have assisted trial counsel in locating witnesses, communicating with Spanish-speaking family members, and persuading prosecuting authorities to dismiss capital charges. *See, e.g.,* Laura Lafay, *Virginia Ignores Outcry*, THE ROANOKE TIMES, July 6, 1997 (noting that Mexican consulate negotiated plea bargains on behalf of two Mexican citizens facing the death penalty)(article attached as Exhibit L to Application for Writ of Habeas Corpus); Claire Cooper, *Foes of Death Penalty Have a Friend: Mexico*, SACRAMENTO BEE, June 26, 1994, at A1 (noting Mexico's intervention in Kentucky and California capital cases where death penalty avoided) (attached as Exhibit M to Application for Writ of Habeas Corpus). Mexico routinely serves as a liaison between the defendant and his trial counsel. Perhaps most important, given the facts of this case, Mexico also assists defendants in locating competent defense counsel. All of these efforts are consistent with the non-exhaustive list of functions enumerated in article 5 of the Vienna Convention.[12] 21 U.S.T. 77, art. 5.

The consular services described above would have been available to Mr. Suárez Medina at the time of his 1989 arrest. Mexico's consular assistance program has been in existence for several decades. *See* Exhibit B to Application for Writ of Habeas Corpus (Affidavit of Juan Manuel Gomez Robledo). In 1981, the Mexican Foreign Ministry created a special category of consular officers, whose sole purpose was to protect the rights of Mexican nationals abroad. *Id.* In 1986, Mexico initiated a Program of Legal Consultation and Defense for Mexicans Abroad, under which Mexican foreign service officers studied at U.S. law schools to develop an expertise in the

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two death sentences were commuted. MEXICAN MINISTRY OF EXTERNAL RELATIONS, ANNUAL REPORT (2000).

[12] The U.S. Department of State also recognizes that a consular official should serve as "effective liaison with attorneys, court officials and prosecutors," 7 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL §423.3, and should help "arrestees understand what is happening to them" as "a yardstick against which they can measure attorney performance." *Id.* at §413.4

American judicial system. *Id.* These consular officers were then assigned to consulates around the country, in order to assist U.S. lawyers representing Mexican nationals in complicated proceedings. *Id.*

In 1989, the Consulate of Mexico in Dallas, which was responsible for the welfare of Mexican nationals living in Texas, had close working relationships with local attorneys who were available to advise the consulate in complex criminal cases involving Mexican nationals. Exhibit C to Application for Writ of Habeas Corpus (Affidavit of Oliver Albert Farres Martins). Consular officers would have sought out their assistance in Mr. Suárez Medina's case, and would have consulted them regarding standards of representation in capital cases. *Id.* The consulate could also have retained a lawyer to advise trial counsel. *Id.* If trial counsel appeared to be mishandling Mr. Suárez Medina's case, the consulate would have petitioned the court to appoint more experienced counsel, or – if those efforts were unsuccessful – would have sought funds from the Mexican Foreign Ministry to retain additional legal counsel. *Id.*

In addition to assisting Suárez Medina obtain competent legal representation, the consulate could have provided funds for an investigator or mitigation specialist, if trial counsel lacked the resources to obtain their assistance. *Id.* at para. 8. The consulate would have been willing to assist in gathering records from Mexico, facilitating contact with Spanish-speaking witnesses, and arranging the transport of Mexican witnesses to trial. *Id.* In the words of Oliver Albert Farres Martins, the Consul General of Mexico in Dallas in 1989, "the Dallas consulate would have played as active a role as necessary to help ensure Mr. Suárez Medina avoided the death penalty." *Id.* at para. 18.

Had Mexican consular officials been promptly notified of Mr. Suárez Medina's detention,

they would have been in a position to assist him and his counsel in preparing for trial. At that point, their efforts would have made a qualitative difference in his defense. Once Mr. Suárez Medina was sentenced to death, there was nothing they could do to change the outcome.

CONCLUSION

Amicus the Government of Mexico respectfully urges this Court to grant Mr. Suárez Medina's application for writ of habeas corpus and vacate his unlawful conviction and death sentence. In the alternative, Mexico respectfully requests that this Court remand the case to the lower court for a full and fair evidentiary hearing.

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Respectfully submitted,

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